acknowledgment of the effects of a la carte policies on the public interest concern of diversity of programming. Without further analysis, this "voluntary commitment" is, at best, inconsequential to our merger review.

Noncommercial and Qualified Entity Channels. The Applicants' commitment to set aside four percent of full-time audio channels for noncommercial educational and informational programming as well as four percent for qualified entity programming is small step in the right direction. There is no explanation, however, as to why these commitments are significant enough to offset the potential public interest harms created by a merger to monopoly.

In terms of noncommercial educational and informational programming, the acquiescence in the Applicants' "voluntary commitment" merely enshrines the status quo. The Applicants currently already offer an equivalent amount of such programming on their combined systems. The voluntary commitment adds nothing to offset the effects of the merger. We should have required substantially more spectrum to be set aside for such public interest programming.

In terms of diverse programming by qualified entities, it is far from clear that a paltry four percent set-aside will be commercially viable. Several commenters have expressed that there is no business case for such a small offering. The decision today rejects the guidance of members of Congress, state Attorneys General, and public interest organizations that have called for a larger spectrum set-aside to ensure competition and diversity in satellite radio service to offset the massive concentration that is being permitted. And, it is left entirely unclear how the qualified entities will be selected, leaving the entire provision unintelligible and unpredictable. "We will determine the implementation details for use of these channels [for qualified entities] at a latter date,"[17] is a clear indication of the Commission's historic pattern of neglecting minority access to the communications industry. Once again, rather than taking a decisive step forward to improve the plight of women and people of color in media, the Commission has taken a step to the side.

Interoperable Receiver. The *Order* characterizes the Applicants' interpretation of the Commission's interoperability requirement as "not unreasonable" to excuse their earlier failure to develop and market interoperable receivers. The Applicants' noncompliance created switching costs for consumers and, thus, limited pre-merger competition between the Applicants. Adding this condition today is virtually meaningless, because the merged entity will have every incentive to offer interoperable devices anyway. The point was to enforce the requirement before, not after, the merger. Doing it now is clearly a case of closing the barn door after the cows got out. At least the *Order* recognizes that this claimed benefit simply cannot be deemed merger-specific.

Open Access. The *Order* uncritically embraces the Applicants' proffered open access scheme,[18] concluding that commercially reasonable, non-discriminatory licensing will effectively mitigate any potential vertical harm from the satellite radio monopoly. However, there is no effective mechanism to deliver a truly open, competitive market. The open access provision should function to ensure

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to the Public, (Med. Bur., Feb. 9, 2006) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf.

[17] *Order* at ¶ 135.

[18] Letter from Richard E. Wiley, Wiley Rein LLC, Counsel for Sirius Satellite Radio Inc., and Gary M. Epstein, Latham & Watkins LLP, Counsel for XM Satellite Radio Holdings Inc., to Kevin J. Martin, Chairman; Michael Copps, Commissioner; Jonathan Adelstein, Commissioner; Deborah Tate, Commissioner; and Robert McDowell, Commissioner, FCC at 2 (July 25, 2008); Applicants' June 13, 2008 Ex Parte at 4-5.

competition, innovation, and the delivery of advanced technologies in the satellite radio receiver, and to some extent, the broader audio equipment manufacturing market. By shortsightedly permitting the merged entity to retain control of the design, manufacture and distribution of satellite radio receivers, it allows the merged company to maintain gatekeeper authority over the market. This is letting the fox guard the henhouse. We should have, as I proposed, required an independent laboratory to certify compliance with the technological specifications and quality standards.

HD Radio. One of the mechanisms the merged company will use to maintain its lock on the equipment market will be through product subsidies. While many consumers will find these beneficial, we should have guarded against the use of them for anticompetitive purposes. While some proposed that we require HD radio technology be incorporated into all new satellite receiver models capable of receiving analog terrestrial radio, I proposed we require it only in subsidized models. That way, if there were truly an open market for devices, as an independent process for certification would have ensured, the market would determine whether to integrate HD radio into the devices. Where the merged company sought to alter market dynamics through subsidies or other mechanisms, it would be prevented from discriminating against competing HD radio technology. Instead, the *Order* allows the merged company to avoid subsidizing models that include HD radio, thus using their market power to thwart the very competition the Applicants cited as justifying the merger.

While I am pleased that the *Order* is explicitly conditioned on compliance with the voluntary commitments, we should have instituted an independent monitor to assist the Commission in reviewing complaints and enforcing even these meager conditions. This is particularly necessary in light of the fact that the Applicants just paid record fines for widespread and flagrant violations of Commission rules over a number of years.

In looking back over the torturous and excessively long period during which this merger was under consideration, one commentator has criticized the commitments as mere "crumbs that have fallen off the table."[19] It is remarkable that the Commission took so long to do so little.

While the *Order* repeats a public interest incantation over and over again, it does little to explain why each particular condition has gone far enough to protect the public interest. With unchecked optimism, the *Order* concludes that the public interest is precisely satisfied by the proffered "voluntary commitments" and other nominal conditions. Because the proposed transaction, as structured, has not been shown to serve the public interest, the merger application should be designated for hearing.

For the foregoing reasons, I dissent.

[19] *See* Jeffrey H. Birnbaum, *Radio Merger Under Fire From Black Lawmakers*, WASH. POST, June 17, 2008, at D01 (quoting Representative Elijah E. Cummings).

STATEMENT OF COMMISSIONER DEBORAH TAYLOR TATE

Re: *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57.*

In my two years at the Commission, few decisions have been more difficult than the one before us today. As a strong supporter of free-markets and limited government regulation, I am predisposed to allow private companies the autonomy to make business decisions without the heavy hand of government regulation. By law, we are required to review this merger application because it involves the transfer of a radio license, and more specifically, the Commission's rule against one SDARS licensee holding both SDARS licenses. Our consideration necessarily presents unique and complex challenges because of the infancy of the satellite radio market, the past actions of the two companies, and the potential public interest benefits that would accrue from the merger. In approaching this analysis, I thought it more prudent to first address the multiple violations committed by the Applicants over the past five years, and then consider the merger application. The forfeitures imposed against these companies, in combination with the strict compliance plan they will submit to, convince me that it is now reasonable to consider and approve the merger application. With the sluggish economic outlook and the Dow Jones Industrial Average closing down almost 100 points in mid-July, compounding this environment with a negative regulatory decision could greatly harm both companies and, more importantly, their subscribers. While the FCC is only a tiny piece of the economic puzzle, I believe it is our responsibility to contribute to a vibrant, healthy marketplace within those sectors under our purview.

In order to fulfill my statutory obligations, and appropriate due diligence, I met repeatedly with both SDARS companies, their top management, consumer groups, members of Congress, minority broadcasters, terrestrial broadcasters from all across the country, religious, noncommercial, and public interest broadcasters, automobile manufacturers, previous SDARS bidders, investors, public citizens, mayors, local community leaders, state attorneys general-- and then there were the nearly 15,000 formal and informal comments the Commission received. My personal office received hundreds of phone calls from individual citizens and organizations in at least 30 states. It seems that every segment of society has an interest in this merger—I even hear about it at the grocery store and when I open my local newspaper. I believe that everyone involved knows that I have listened to all sides openly and equally, and weighed their arguments thoughtfully.

In the end, I voted to approve this merger because I believe that the free terrestrial broadcast radio industry that has been part of the fabric of our country will not only survive, but flourish in this new digital age, and competition from satellite radio will continue to challenge local broadcasters to deliver the type of high-quality, local product they have delivered for the last hundred years. If you don't believe me, look at those who have staked their businesses on the future of terrestrial radio and its reach to 95% of the radio-listening market, like Rush Limbaugh who recently signed an eight-year, $400 million deal with Clear Channel.

Section 310(d) of the Communications Act requires parties seeking to transfer a license to demonstrate that the proposed transaction will serve the "public interest, convenience, and necessity." The Commission weighs the potential public interest benefits against the potential harms. The Applicants have the burden of proving that the proposed transaction, on balance, serves the public interest by a preponderance of the evidence. While my remaining concerns are many, I find that the Applicants have shown that this merger, with the voluntary conditions and concessions, and the previously agreed upon consent decree for their violations, on balance, will serve the public interest.

I. ENFORCEMENT

From the beginning, it was imperative to me that before I could review the merger application, the Commission must take enforcement action, either by entering into a consent decree or otherwise resolving the pending violations. I believe that the agreement that was reached appropriately penalizes the companies, with minimal impact on their subscribers. The almost $20 million these parties will pay is a reflection of the seriousness of the violations. Thus, the forfeitures and the compliance plans the parties will be subjected to are an appropriate form of retribution, rehabilitation, and reconciliation.

The parties before the Commission today have knowingly violated a number of Commission rules and guidelines. For this reason, I felt it was necessary to resolve the issues through enforcement action first, and then proceed to consider the merger application. XM has agreed to pay $17,394,375 and Sirius has agreed to pay $2,200,000 million for violating modulator and terrestrial repeater rules. In addition, both companies have entered into consent decrees that mandate strict compliance with certifications, reporting requirements, and penalties associated with future violations. Specifically, they have agreed to hire compliance officers whose primary responsibility will be to ensure compliance with FCC rules. They will adopt a Procedural Guide for satellite radio receivers, establishing step-by-step procedures that employees must follow in connection with testing and obtaining FCC certification for new receivers. They will adopt a Repeater Change Guide, which will establish procedures to be followed before *any* changes can be made to the terrestrial repeater network. They will shut down, or bring into compliance, 100 repeaters and all others will be processed according to standard FCC guidelines. I find this compliance plan, in conjunction with the monetary forfeitures, sufficient to allow me to consider the merger application.

II. PRO-CONSUMER

With daily rumblings about a possible recession - and nearly universal consensus that we are in a pattern of economic slowdown - good economic policy from our government is more important than ever. It is not the job of the FCC to prop up failing companies. However, it is our job to support efficient and affordable radio communications. Section 7(a) of the Telecommunications Act says, "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public." The Commission aims to ensure audio options that provide lower prices, and unique choices such as "family friendly programming" tiers. Through this Order we ensure that for at least three years consumers will see a price cap on every price tier and package that the merged entity offers. The FCC will revisit the need for this price cap six months prior to its expiration.

III. CONCENTRATION OF SPECTRUM/SET-ASIDES

Since this merger was first proposed, I have continued to voice concern regarding the concentration of 25MHz of spectrum in the hands of a single entity. Divestiture, which I initially proposed to both parties, is impractical, if not impossible, and would result in almost certain disruption of service to millions of subscribers. It could have resulted in disruption of service possibly lasting several years as the Commission attempted to create rules and consumers migrated from one SDARS system to the other. Therefore I recognize the practical necessity of reversing the Commission's 1997 rule barring either party from holding both SDARS licenses.

Thus, the purposes of spectrum divestitures are to at least some degree accomplished by the set-aside requirements we adopted. Four percent of all channels on both systems must be set aside for non-commercial educational programming, and four percent must be set aside for use by "qualified entities" such as minority broadcasters. Only one programming channel per programmer will count towards the set-aside. This will promote a greater diversity of voices, and grant complete editorial control to other programmers and owners. Public interest groups, while pushing for an even greater number of set-aside channels, have applauded this condition. The FCC will determine the appropriate process for selecting programmers to occupy set-aside channels. The Applicants will not be part of this process.

IV. PRICE CAP

Because SDARS is a relatively new service, and prices have remained constant, it is difficult to anticipate how a merger will affect future prices. The parties have agreed to a three year price cap on the services they currently offer. This is not a sufficient fix to prevent the anticompetitive pricing schemes that could arise as a result of this merger. Thus, the Order imposes a review by the Commission before the lifting of the price cap in three years. At that time the merged entity will have the burden of demonstrating to the Commission that lifting the price cap will not result in the merged entity raising and holding prices at a level they could not otherwise maintain, but for the lack of competition in the satellite radio market.

V. HD CHIP

As a lifelong champion of the music industry and local broadcasters, I am sympathetic to the needs of the HD radio industry and promises it holds as another audio choice for consumers. However, many commenters, particularly those in the automobile industry oppose a government mandate requiring inclusion of HD chips in all radios, and the resulting increase in cost. HD radio is already in cars manufactured by BMW, Mercedes, Land Rover, Mini Cooper, Hyundai, Rolls Royce, and Jaguar. In 2009, it will also be available from Volvo and Ford. I do not believe the record of performance by this nascent technology supports a mandate for inclusion of the HD chip in every satellite radio. I do, however, support the Order's prohibition on any attempts by the Applicants to bar, by agreement or otherwise, a car manufacturer or other third party from including HD radio chips, iPod compatibility, or other audio technology. The merged entity must provide open access. In fact, I demanded that the technical specifications be available immediately, rather than in a year, as originally proposed.

In considering this difficult issue, I consulted the auto industry, where satellite radio has established a strong foothold. Without exception, the auto manufacturers I spoke with urged the Commission to forbear from imposing an HD chip requirement. Their estimate of the cost per car was, on average, two, three, or four times the cost suggested by iBiquity. With this level of disparity in information, it is impossible to do a proper cost-benefit analysis. Additionally, at a time when the auto industry is struggling, it would be unreasonable to require them to assume a cost, or, even worse, pass a cost on to their consumers, for a technology that has not yet proven the strength of consumer demand.

Thus, I believe the proper path for the Commission to take is to review the issue, along with the price cap, in three years. In addition, we will launch a Notice of Inquiry to examine what the resulting costs would be and whether HD should be mandated. In the interim, I encourage the HD radio industry to find new and innovative incentives to offer car manufacturers to include their technology in automobiles, just as other technologies have done, to increase their uptake and adoption, perhaps including an innovative revenue-sharing model.

VI. RIAA

Of the many concerns that were brought to my attention throughout this process, one of the most disturbing to me, as a life-long resident of Nashville- Music City- was the potential threat to the music industry. XM and Sirius, unlike terrestrial broadcasters, pay million of dollars in royalties to the record labels whose music they play. This is an important source of income for labels and musicians. With the adoption of new non-music tiers, concerns were raised about a potential reduction in revenue to the music industry. However, even the "News, Sports and Talk" tier includes music channels, such as Radio Disney, which will result in royalty payments. In addition, I requested, and XM and Sirius have provided, assurances that it is not their intent to do anything to decrease royalties through gamesmanship of these new programming tiers. Their primary business has been, and will continue to be, music—not news and sports. In fact, the impetus for these decisions is just the opposite—increasing revenues is

mutually beneficial for both parties. I will continue to monitor the effects of this transaction on the music industry and anticipate the parties will work with the Commission to protect this important source of revenue for America's music industry.

VII. TIERED CHOICES

As a long-time supporter of family-friendly media choices, I shared the concern of many commenters regarding the level of coarse programming on satellite radio. I associated myself with the comments of Senator Brownback who said, "Both XM and Sirius prominently feature sexually explicit programming that is highly inappropriate and contributes to the increasing coarseness of American society." (Letter of June 28, 2007). With this in mind, I was pleased to see the parties offer to provide a "Family-Friendly" tier of programming, a less expensive alternative to their full lineup of channels that will not include any indecent or profane content. I was also pleased to see that they have a tier available that allows consumers to choose any 50 or 100 channels they wish to receive from the entire programming lineup. This, too, will allow parents the option of removing those channels they find offensive or inappropriate for their family. Finally, the "News, Sports, and Talk" tier will be free from much of the content parents may not wish their children to hear. Just as in the video industry, I believe that keeping inappropriate content on subscription services that consumers must invite into their homes, and pay for, such as satellite radio and cable television, serves the public interest.

VIII. LOCAL PROGRAMMING/ADS

Many broadcasters contacted the Commission regarding the merged entity's threat to local programming and advertising. Because local advertising revenue traditionally accounts for over 70% of radio revenues, it is critical to local broadcaster's business model. The original licenses, and this Order, unambiguously prohibit local programming- including local advertising. Likewise, the parties have agreed that they do not now, nor do they intend to, air local programming. This Order specifically finds that they must refrain from airing any local programming or advertising whatsoever over terrestrial repeaters or future technologies. All programming aired by the merged entity will be available strictly on a nationwide basis. This is yet another area where the FCC will be carefully monitoring the compliance of the companies. Parties that feel a violation of this prohibition has occurred are encouraged to contact the Commission and file a complaint.

IX. OPEN ACCESS

At my request, the parties agreed to make the technical specifications for their equipment available immediately, rather than in a year, as originally proposed. Third parties will be able to access the technology necessary to produce satellite radio receivers for sale at retail and to automobile manufacturers sooner. Thus, competition in the satellite radio equipment market should begin to emerge in upcoming months.

X. COMPLIANCE PLAN

As part of the consent decree the parties have agreed to a strict compliance plan, which includes the following:

- Hire FCC Compliance Officer responsible for ensuring future compliance with Act and Commission rules;
- Adopt Procedural Guide establishing procedures for testing, certifying and making modifications to satellite radio receivers and Repeater Change Guide establishing procedures for making any changes to terrestrial repeater network;

- Conduct audits of randomly selected satellite radio receivers to ensure compliance with FCC requirements;
- Establish an FCC Compliance Training Program for all employees who engage in activities subject to FCC regulation;
- Provide notices to subscribers offering various technical fixes to non-compliant radio receivers at no cost to subscriber via its website, subscriber newsletter and automated telephone response;
- Broadcast on-air notices to subscribers regarding non-compliant radio receivers;
- Turn off or bring into compliance 100 terrestrial repeaters, and send the others to FCC's International Bureau for processing;
- Replace non-compliant radio receivers returned by consumers for repair or warranty claims with compliant devices; and
- Submit periodic compliance reports to FCC.

In addition, the parties will be subject to a combined forfeiture of approximately $20 million. All future violations will be subject to the maximum monetary penalties, and will be considered in light of these past violations.

CONCLUSION

In conclusion, I voted to approve this merger in light of the many public interest benefits, such as the three year price cap, lower-priced tiers, the family-friendly programming tier, the set-aside for diversity, the set-aside for non-commercial, educational programming, the ban on agreements to prevent HD radio or other audio technologies from being integrated into satellite radios, the prohibition on intentionally reducing revenues paid to musicians and record labels, and the prohibition on exclusive contracts for sports programming.

I will continue to encourage the merged entity to work with the WCS licensees toward resolution of the rules regarding interference issues in the WCS band. In the absence of an industry agreement, I will encourage my colleagues to adopt rules in the near future. I hope we can soon resolve this issue which has been outstanding for ten years.

The FCC will oversee the compliance of these two companies, and I personally intend to follow up with the merged entity, and the FCC's Enforcement Bureau, to assure they are fulfilling the terms of the enforcement and merger agreements. The Commission will seek to ensure that the merged entity uses the spectrum it has been allocated efficiently, as one of our country's most important public resources. The Commission will also ensure that the spectrum is used in a way that serves the public interest by enhancing diversity and giving voice to minority and noncommercial broadcasters.

STATEMENT OF
COMMISSIONER ROBERT M. McDOWELL

Re: *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57.*

I am pleased to support this merger and look forward to the consumer benefits that will result from the combination of XM and Sirius.

Competition in the audio market has grown substantially in the past few years. Barely one generation removed from AM and FM radio and vinyl albums, we now have a still vibrant AM/FM dial, full of music, news and talk radio of all stripes, HD radio with its multicast streams of content, mp3 players, Internet radio and much more. When discussing this merger, it is important to keep in mind that satellite radio – both XM and Sirius combined – comprises only five percent of that audio marketplace.

Despite these highly-competitive market realities, this merger order is one of the most heavily-conditioned in FCC history. With the obligations we have imposed, and those that the companies have voluntarily undertaken, the combined company, post-merger, will offer several new, attractively priced programming packages for consumers, will open up opportunities for noncommercial educational programmers and minority-owned programmers to gain carriage on the satellite radio platform, and will create opportunities for competition in the satellite radio equipment market, so that consumers can enjoy more choices.

I am also pleased that we have resolved the enforcement issues regarding terrestrial repeater and radio equipment violations admitted by XM and Sirius. As the consent decrees demonstrate, the Commission takes such rule violations seriously and will carefully examine the ongoing compliance of the combined company with our regulations.